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Issue Date: **18 November 2002**

In the matter of
Arthur Nides
Claimant
v.
1979, Inc.
Employer

Case No.: 2002DC W00006
OWCP No. 40-1795937

and
Director, Office of Workers' Compensation Programs
Party in Interest

DECISION AND ORDER

This claim arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*., as extended by the District of Columbia Worker's Compensation Act, 36 D.C. Code §§ 501 et seq *et seq.* (hereinafter collectively referred to as "the Act"). On June 24, 1982, while working for employer, claimant sustained a low back injury when he fell down a wet staircase.

On April 7, 1988, claimant's compensation claim under the Act was settled pursuant to Section 8(i), 33 U.S.C. §§908(i); pursuant to this approved settlement, employer remained liable to claimant, pursuant to 33 U.S.C. §§907, for medical benefits arising as a result of claimant's work-related injury (CX 1)[1]. This is the sixth claim and the seventh time that Claimant and employer appeared before an administrative law judge regarding a dispute over employer's liability for claimant's purported work-related medical expenses. He was *pro se* more often than not over this period, but was represented during the pendency of the claim before the fifth administrative law judge assigned to hear the case (92-DC W-l before Judge William Terhune Miller, Decision and Order dated July 29, 1998).

The Claimant is now represented by Bruce Bender, Esquire, Van Grack, Axelson & Willjamowsky, P.C., Rockville, Maryland. During a hearing held on August 6, 2002, the Claimant appeared ***pro se***, and post hearing, I left the record open to give the Claimant an opportunity to seek counsel. I granted the Claimant an extension to November 4 for this purpose. At hearing the following exhibits were admitted into evidence:

Seven (7) administrative law judge exhibits;

Nine (9) claimant exhibits.

Subsequent to hearing, Mr. Bender entered his appearance and filed a brief on behalf of the Claimant. The Employer/Carrier is represented by Michael S. Levin, Dirska & Levin, Columbia, Maryland.

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[1] Claimant's exhibits are marked"CX"; Employer's exhibits are "EX", "Court" Exhibits and "ALJ" exhibits are also part of this record.

Although the Claimant had alleged that certain medical bills and services were owing in his request for hearing, all of these were stipulated as no longer at issue by the parties.[2]

The Claimant asks me to review travel expenses sought by claimant that cover a period from September, 1984 through October, 2000 and for payment for the purchase of an exercise bicycle. He alleges that certain medical reports were not introduced into evidence at a hearing held October 19, 1995 in case number 92-DCW-1 (at which time he was *pro se*), or in post hearing development performed by an attorney. That case was decided July 29, 1998.[3] On October 18, 1999, the Benefits Review Board issued a Decision and Order relating to the claim. BRB No. 99-0162, ALJ-2. The Claimant asserts that he was the victim of legal malpractice by his former attorney, Michael McCullough Esquire, in the proffering of (or in the failure to proffer) post hearing development and that absent this malpractice, he would have submitted a timely request for compensation for transportation expenses and the cost of the exercise bicycle in the case decided by Judge Miller on July 29, 1998. In that Decision and Order, the Claimant was awarded ongoing reasonable and necessary medical care related to his June 24, 1982 injury including medical consultations with Dr. Marcolin and physiotherapy sessions. Judge Miller, however, determined that the Employer was not liable for a new stationary exercise bicycle, the cost of a swimming program or travel expenses to and from the swimming program and to and from his doctors appointments the latter travel expenses were denied because of the judge s ruling in that there was a failure of proof. Further, Claimant's request for reconsideration of the administrative law judge's decision regarding his request for a stationary exercise bicycle were denied by the administrative law judge.

Subsequently, the Claimant fired Mr. McCullough (TR 33).

On October 22, 1998, the Claimant filed an appeal of Judge Miller's Decision and Order and the Decision and Order Denying Petition for Reconsideration. The Benefits Review Board reversed Judge Miller on the issue of reimbursement of travel expenses to Dr. Marcolin and physiotherapy. (BRB No. 99-0162).[4] However, the Benefits Review Board let stand the determination that the Claimant was not entitled to the exercise bicycle.

The Claimant advises that he was not aware that he was entitled to reimbursement for the transportation costs.

In testimony, Claimant alleged that Mr. McCullough had failed to present certain documents at the hearing that were crucial to his case (TR 30). Specifically the Claimant asserted that four physicians reports were not placed into evidence (TR 34). The Claimant fired Mr. McCullough in 1998 prior to the appeal taken to the Benefits Review Board (TR 33). The Claimant did not find out that the medical reports were not placed into evidence before Judge Miller "until long after he fired Mr. McCullough, therefore, he was unable to address this issue with Mr. McCullough." See Claimant's brief. The Claimant also again reiterated that he was

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[2] Payment of a medical bill of $620.00 (Tr 22); payment of bills for $ 156.77 for electrodes, Tylenol and batteries (Tr 25 to 29); $ 183 in transportation costs for the period February 10 to April 3, 2002 (Tr 29 -30, CX -7) see ALJ -5 and CX-9.

[3] As a matter of convenience, this opinion was entered into evidence as ALJ -3.

[4] Again, as a matter of convenience, this opinion was entered into evidence as ALJ -2.

unable to understand at the earlier settlement what was happening "because at the time my English was so poor, I cannot read English" (TR at 5).

This is the second time that the Claimant has asked me to review the 1998 decision. In my prior decision at 2001 DCW 0002, rendered August 17, 2001, part of my inquiry at hearing involved whether the claimant had proceeded on a new claim or whether he had requested modification of the prior claim under 33 USC §§ 922.[5] At hearing in 2001, the Claimant argued that I should revisit the opinion rendered by Dr. Hinkes (Tr 9-12). Since the July, 1998 ALJ decision and the Benefits Review Board appeal that relied on Dr. Hinkes' opinion, a thorough review would also entail a request to modify those decisions. Post hearing, in a document Dated July 31, the Claimant submitted an excerpt from the Transcript and a copy of a letter, dated November 25, 1998, addressed to the Benefits Review Board with respect to his appeal. However, this evidence did not relate to the issue whether the Claimant had requested modification. After a review of the entire file, including the record of Judge Miller's Decision and Order, I found that a review of the correspondence between the Claimant and the District Director during the pendency of that claim disclosed that the Claimant did not request modification, either expressly or by implication, within one year of the Benefits Review Board determination. The Claimant did not appeal this decision. I note that at that time, Mr, Nides did not allege that his former attorney, Mr. McCullough, had committed malpractice.

In the current case, Mr. Nides again asked me to review the opinions rendered by Dr. Clinton Hinkes. The Claimant argued that Dr. Hinkes' report was not made available to him earlier by his former attorney. He presents the following in support of his position:

1. Report of Maxwell Hurston, M.D., dated October 20, 1983 (CX 1);
2. Reports of Stacy L. Rollins, Jr. dated June 24, 1982, March 18, 1985 and July 15, 1985 (CX 2);
3. Report of Lorenzo Marcolin, M.D. dated August 15, 1985 (CX 3);
4. Report of Norman J. Horwitz, M.D. dated September 18, 1985 (CX 4); and
5. Report of Stephen T. Michaels, M.D. dated May 21, 2002 (CX 5).

The Claimant sought review of transportation fees to and from the mall from September 1984 through October 2000, back payment of transportation fees to and from physical therapy sessions from September, 1984 through October, 2000 and payment for the purchase of an exercise bicycle.

Modification

33 USC §922 sets forth as follows:

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 8(f) [33 USC §§ 908(f)]), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 44(i) [33 USC §§ 944(i)]) in accordance with the procedure prescribed in respect of

[5] As a matter of convenience, this opinion was entered into evidence as ALJ -4.

claims in section 19 [33 USC §§ 919], and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

The Seventh Circuit Court of Appeals has recently ruled that a "rejection of a claim" triggering the one-year period for petition for modification under Longshore and Harbor Workers' Compensation Act (LHWCA), as incorporated in the Black Lung Benefits Act (BLBA), includes rejections of a modification petition, thus allowing for successive modification petitions as long as they meet the one-year requirement. Federal Mine Safety and Health Act of 1977, § 422(a), as amended, 30 U.S.C.A. § 932(a); Longshore and Harbor Workers' Compensation Act, § 22, 33 U.S.C.A. § 922. ***Old Ben Coal Co. v. Director, Office of Workers' Compensation Programs***, 292 F.3d 533 (7th Cir, 2002). Thus, the Seventh Circuit finds that principles of finality do not apply to claims under the Longshore and Harbor Workers' Compensation Act (LHWCA).

I have no problem reviewing my decision dated August 17, 2002, as the Claimant's request for hearing was filed within one year of the date of that Decision and Order.

However, the Claimant requests that I reopen that decision to tack my review of modification to Judge Miller's Reconsideration Decision and Order and the subsequent Benefits Review Board decision. The Claimant by brief, acknowledges that he failed to request modification within one year, but alleges that he did not request modification within the one year time period for three reasons:

- First, the Claimant was unaware that he was entitled to the back transportation costs that he now requests;
- Second, the Claimant asserts he had ineffective counsel and thus was unaware that certain medical documents were not produced during the hearing; and
- Third, the claimant asserts that he is unfamiliar with the English language and was unable to comprehend the legalities and consequences of his settlement and hearings thereafter.

The Employer/Carrier argues that the claim for mileage to and from the mall had been specifically disallowed. The denial of this benefit was affirmed by the Benefits Review Board.

The Employer/Carrier further alleges that Claimant's argument as to ineffective assistance of counsel does not contain anything beyond "a bald allegation", as no proof has been proffered that there were any records not submitted into evidence which would have been relevant to the mileage issue. At the hearing conducted on August 6, 2002, Claimant proffered that certain records from 1982 through 1985 were not submitted into evidence at the 1995 hearing. However, no factual information relevant to a claim for mileage to and from a shopping mall was proffered.

As to the allegation relating to the command of the English language, the Employer argues that the record shows that the Claimant has represented himself in numerous proceedings before

the Office of Workers' Compensation Programs, and that he has also represented himself before the Office of Administrative Law Judges in several formal hearings. He has filed Pre-Hearing Statements on his own, has submitted correspondence to submit evidence, and has generally not done anything to demonstrate that he is incapable of managing his legal affairs.

Evaluation of the Evidence

As stated above, the Seventh Circuit case ***Old Ben Coal Co. v. Director, Office of Workers' Compensation Programs,*** supra, permits §22 modification review of successive cases. In this case, Claimant argues that, although the Claimant failed to request modification within one year of the 1998 decision and the Benefits Review Board decision dated October 18, 1999, I should apply the Doctrine of Equitable Tolling. I am advised by the Claimant that the equitable tolling doctrine has been "read into every federal statute of limitation." ***Holmberg v. Armbrecht***, 327 U.S. 392, 397, 90 L. Ed. 743, 6 S. Ct. 582 (1946). In ***Bowen v. City of New York***, 476 U.S. 467, 479, 106 S. Ct. 2022, 2030, 90 L.Ed. 2d. 462 (1986), I am advised that Federal Courts have allowed equitable tolling in situations where the claimant has actively pursued and acted with due diligence in preserving his legal rights. ***Wakefield v. Railroad Retirement Board***, 131 F. 3d 967 (11th Cir. 1997). (Dealing with equitable tolling under the Railroad Unemployment Insurance Act). In ***Wakefield,*** the Eleventh Circuit held that the Plaintiff had not acted with due diligence in preserving his legal rights and did not allow equitable tolling. And I am advised that the courts have been more willing to allow equitable tolling to ***pro se*** Plaintiffs. The United States District Court for the District of Columbia, in dealing with an equitable tolling claim under Title VII, noted that courts have given greater leniency in the application of equitable principles to parties proceeding pro se in Title VII cases." ***Cristwell v. Veneman***, 2002 U.S. Dist. LEXIS 17596 (D.C. 2002)[6]. The District Court stated that ***pro se*** parties still must act diligently in pursuing their claims, and that those "who make diligent but technically defective efforts to act with a limitations period" have been excused by Courts. Id.

The rationale for allowing modification is to render justice under the LHWCA. ***Finch v. Newport News Shipbuilding & Dry Dock Co.***, 22 BRBS 196 (1989). To that end, the trier of fact
is given wide discretion to modify a compensation order. ***O'Keeffe v. Aerojet-General Shipyards***, 404 U.S. 254 (1971). Section 22 was intended by Congress to displace traditional notions of *res judicata*, and to allow the fact-finder, *within the proper time frame* after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted. ***Hudson v. Southwestern Barge Fleet Services, Inc.***, 16 BRBS 367 (1984) (citations omitted). When reopening a claim, "a court must balance the need to render justice against the need for finality in
decision making. ..." ***General Dynamics Corp. v. Director, OWCP***, 673 F.2d 23 (1st Cir. 1982).

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[6] ***Cristwell v. Veneman***, Civil Action No. 01- 0116, 2002 WL 31068502 (D.D.C. September 17, 2002) (Walton, J.) (finding the plaintiff failed to exhaust administrative remedies where he failed to timely comply with each administrative deadline and offered no evidence that he acted in a diligent manner or that equitable principles should apply).

I am advised that the Claimant should be allowed to seek modification of his award under the doctrine of equitable tolling, because despite his "due diligence" in pursuing his claim, "exceptional circumstances" prevented him from timely asserting his right to modification.

Bowen, *supra*, resulted where the government's secretive conduct precluded claimants from becoming aware that government was routinely denying Social Security benefits pursuant to an illegal internal policy, and in such a situation, equitable tolling may lie.[7] I note that the Social Security Administration regulations is a more exhaustive rule than the Longshore Act.[8] And they also have a "good cause" standard for certain claims.[9] This agency has chosen not to provide a

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[7] Conversely, the rule argued by the Claimant was expressly rejected under the Act The doctrine of equitable tolling does not apply to suspend the running of the 60-day filing period. ***Brown v. Director, OWCP***, 864 F.2d 120, 12 BLR 2-147 (11th Cir. 1989); see also ***Shendock v. Director, OWCP***, 893 F.2d 9458 (3d Cir. 1990); ***Bolling v. Director, OWCP***, 823 F.2d 165 (6th Cir. 1987); ***Butcher v. Big Mountain Coal, Inc***., 802 F.2d 1056 (4th Cir. 1986); ***Clay v. Mountain Coal, Inc***., 748 F.2d 501 (8th Cir. 1984); ***Pittston Stevedoring v. Dellaventura***, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom.*, ***Northeast Marine Terminal Co. v. Caputo***, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). It is consistent with decisions rejecting arguments that equitable tolling principles should be applied to the 30-day filing period under 33 U.S.C. §921(a) (1986). See ***Wellman v. Director, OWCP***, 706 F.2d 191 (6th Cir. 1983); ***Insurance Company of North America v. Gee,*** 702 F.2d 411 (2d Cir. 1983). Note, however, that Section 725.478 requires that proper service on counsel is a prerequisite to the running of the 30 day appeal period. ***Patton v. Director, OWCP***, 763 F.2d 553, 7 BLR 2-216 (3d Cir. 1985); ***Youghiogheny & Ohio Coal Co. v. Benefits Review Board***, 745 F.2d 380 (6th Cir. 1984); ***Jewell Smokeless Coal Co. v. Looney***, 892 F.2d 366, 13 BLR 2-177 (4th Cir. 1989).

[8] See 20 CFR §404.987 and §416.1487. Reopening and revising determinations and decisions: (a) General. Generally, if you are dissatisfied with a determination or decision made in the administrative review process, but do not request further review within the stated time period, you lose your right to further review and that determination or decision becomes final. However, a determination or a decision made in your case which is otherwise final and binding may be reopened and revised by us.

(b) Procedure for reopening and revision. We may reopen a final determination or decision on our own initiative, or you may ask that a final determination or a decision to which you were a party be reopened. In either instance, if we reopen the determination or decision, we may revise that determination or decision. The conditions under which we may reopen a previous determination or decision, either on our own initiative or at your request, are explained in §404.988.
[59 FR 8535, Feb. 23, 1994]

[9] 20 CFR §404.989 Good cause for reopening.
(a) We will find that there is good cause to reopen a determination or decision if—

(1) New and material evidence is furnished;

(2) A clerical error in the computation or recomputation of benefits was made; or

similar standard. In ***Pittston Coal Group v. Sebben***, 488 U.S. 105, 109 S.Ct. 414, 102 L.Ed.2d 408, 57(1988) equitable tolling was considered under the Longshore Act, but where fraud did not exist (the agency action here was not taken pursuant to a secret, internal policy, but under a regulation that was published), equitable tolling did not lie. The court noted that absent special circumstances, if respondents wished to challenge tolling, they should have done so when their cases were decided. ***Holmberg,*** *supra,* involved whether a Federal court is bound by a state statute of limitations, where due diligence exists.

And although the Claimant argues that the rules should be more liberally construed to *pro se* claimants, the 60 day filing period analogized above for appeals is ***not*** subject to equitable tolling or estoppel. ***Felt v. Director, OWCP***, 11 F.3d 951 (9th Cir. 1993); ***Cooley v. Director, OWCP***, 895
F.2d 1301 (11th Cir. 1990) (where a petition is pro se, 60 day limit for filing petition for review is a "rigid" requirement, is jurisdictional and is not subject to equitable tolling or estoppel).

Knowledge of a Right to Transportation Expenses

The Claimant argues that the "special circumstances" that I should consider show that, although the claimant alleges that he was unaware, he was entitled to transportation costs going back to the date of his original injury. However, I can not accept that allegation. I am told that this lack of awareness was due to two things beyond the control of the Claimant in that his 1998 attorney did not inform him of his right to compensation for transportation costs and the Claimant could not ascertain this alone. I find that this allegation is contrary to the full weight of the evidence.

Although the Claimant claims transportation expenses were wrongfully denied to him by Judge Miller's order and although he fixes an amount certain for transportation expenses for the period September, 1984 to October, 1980, he also claims that he was misled by his former attorney and did not know that he was entitled to such transportation expenses.

> Your honor approximately because we don't know – we have no idea we entitled to receive those transportation fees. We didn't keep any records or anything....

Tr 36.

At the 2002 hearing, the Claimant estimated that he had made approximately one hundred (100) un-reimbursed visits to medical sources during the period for which he claims entitlement (Tr 10). He testified that he drove his car to and from both facilities (Tr 35). Later, he testified that he was entitled to $3.00 per trip and that he made 300 trips per year for physical therapy at a swimming facility and another 300 trips to a mall, where his physician and his physical therapist advised him to walk (Tr 37 and CX 6[10]). In total, the Claimant requests nineteen thousand two hundred dollars ($19,200.00) in reimbursement (CX 2). The Claimant alleges that he also submitted these to Judge Miller and that they were admitted into evidence (Tr 39).

> (3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or adminstrative ruling upon which the determination or decision was made.

[10] Admitted for identification purposes as a summary of argument.

In his 2001 case, the Claimant did not specifically request transportation expenses relating to swimming therapy and mall walking. The Claimant testified concerning other transportation expenses and receipts relative to Dr. Michaels' treatment and to physical therapy sessions.[11] Mr. Nides testified that he traveled to the physician's office and to physical therapy sessions with a friend, because it was more economical than taking a cab. He testified that he paid in cash. He itemized each trip and submitted them to the carrier as received. Mr. Nides testified he did not drive because his car, "is very old, which already died. It's not working any more. I'm afraid to take it far away not unless I'm three, four, five miles around my house for shopping or for walking.... And I knew very well because of the Judge Miller's decision they did not pay me nothing. If I have receipt from someone, I supposed to receive my transportation." He testified that although he sent each receipt to the carrier, he has not been paid. "Always I send to them. And one time, Stephanie Dunaway (ph.) called me and told me, do not call this office anymore" (2001 Tr. 43-47).

Mr. Nides also contended that he had a friend to drive him rather than take a taxi because he saved money. "If I go with a taxi I supposed to pay double and I supposed to wait taxi to come to my house and I supposed to wait taxi to come to the doctor's office or to physical therapy's office. ... But, if it is a friend, he can stay outside wait me for half an hour." He asserted that it usually costs $15.00 to $20.00, one way. "I prefer to go with someone which he's going to wait for me and he's going to be cheaper. That way, [the] insurance [carrier] save[s] money" (Id. 47-48).

On cross examination, Mr. Nides admitted that he had signed some of the receipts himself because he no longer could find the driver (Id. 57-58). He also alleged that both he and the driver could not read English (Id.).

In the 1998 case, the same issue was considered by Judge Miller as Issue Number 6, whether Claimant was "entitled to reimbursement for past transportation expenses to and from the swimming pool and/or local malls." Judge Miller noted that the Claimant "belatedly" claimed reimbursement for mileage between his home and the malls and to the swimming pool and back home since May 1984, because he asserted that he had only recently learned that he could make such a claim (1998 Tr. 67-68). Claimant submitted recently prepared schedules purporting to show mileage on a daily basis for round trips to various shopping malls in Montgomery county and to the swimming pool every Monday through Saturday, from May 1984 through October 1995 (C-7A through O). According to Judge Miller's decision, this documentary evidence was

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[11] Transportation expenses to Dr Michaels' office for visits:

- December 22, 1998,
- February 9, 1999,
- April 9, 1999,
- June 6, 1999,
- November 1, 1999, and
- November 13, 2000.

- Transportation for physical therapy,
  - For nine visits from July 21, 1998 through August 31, 1998, and
  - For ten visits from April 20, 1999 through May 12, 1999.

based, not on his memory, but on his professed routine of walking twice each week in each of three malls, and the averment that if he did not follow such a routine he would suffer pain and risk the need for surgery. There was no corroboration. He testified that the sign in sheets at the swim facility were kept for only two weeks (1998 Tr. 68-69). He insisted that he walked, regardless of holidays, but had noted the days when the pool was closed. He declared that he had never been sick during the ten years, and had never taken a vacation or traveled, implying that he never missed a regular day. He had not kept records, because he did not know that he was entitled to receive those benefits. 1998 (Tr. 87-91) Although transportation from his house was undoubtedly involved when Claimant walked at the malls, the total claim is not credible, and is not proved with credible specificity. Claimant was impeached on cross-examination as to the accuracy of his claims of undeviating adherence to the routine he described in relation to his mall walking and swim program. (Tr. 91-93). ALJ- 3.

The Benefits Review Board considered the expenses undertaken by claimant in pursuit of his "mall walking" program, where Judge Miller found that the record contained no evidence of a prescription nor of the medical necessity of such a program of exercise in addition to the therapy provided by the treadmill previously awarded to claimant; accordingly, the employer is not responsible for the transportation costs incidental to claimant's mall walking activities. The Benefits Review Board found Judge Miller's findings were rational and in accordance with law; and affirmed the Decision and Order.

As to the swimming program, in 1993 Mr. Nides was awarded the cost of a swimming program. Employer subsequently controverted its ongoing liability for such a benefit, asserting that a definitive swimming program had not been set forth for claimant. After considering the testimony of Dr. Marcolin and claimant, Judge Miller concluded that "Claimant has not pursued a swim program conforming to a particular prescription by Dr. Marcolin," and that claimant's "swimming apparently constituted only a minute and irregular portion of Claimant's use of the swim facility provided for treatment at Respondent's expense." See 1998 Decision and Order at 29-30. The Benefits Review Board noted that Dr. Marcolin, after testifying as to the beneficial aspects of swimming, conceded that he was unaware of claimant's actual swimming efforts or his use of a county recreational facility. The Benefits Review Board found that in addressing his request for a facility pass, the Claimant testified that although he attempts to swim approximately once or twice a week, his back pain usually allows for only one or two laps of such exercise after which he uses the recreational facility's exercise machines and whirlpool. Accordingly, as the record contains no medical opinion or prescription outlining a specific swimming regimen or exercise machine program to be undertaken by claimant, we affirm the administrative law judge's decision holding that employer is not liable for a county facility permit, as claimant has not established his entitlement to such a permit.

In the 2001 Decision and Order, I determined that the Claimant's request for pool memberships for the fiscal years 1998-99 and 1999-2000 were denied. However, I ordered the Employer to provide the Claimant with a membership at the Aquatics Center, Montgomery County, Maryland or an equivalent facility. Mr. Nides testified that, as of hearing, he had not been using the swimming facility.

> Your Honor, I stop swimming pool because I cannot afford it anymore. I did not receive swimming pool since '94 and I cannot afford it anymore and I stop it.

2001 Tr. 29.

In August, 1999, Dr. Michaels advised by a report that the Claimant needs rehabilitation and that he should "start getting back into swimming" (2001 CX 2).[12] James E. Callan, M.D. submitted a report advising that no treatment is needed (2001 EX 1). Dr. Callan also rendered an opinion that Mr. Nides' prognosis is excellent and that current symptoms do not relate to the Claimant's injuries and such treatment as hydrotherapy is not causally related (Id.). However, I credited the Claimant's treating physicians, especially Dr. Michaels to find that the Claimant was entitled to return to a swimming regimen. I accepted that the Claimant met his burden to show that treatment was necessary. Therefore, the Claimant has made a *prima facia* showing that he is entitled to treatment and the burden shifts to the employer to prove that it is not necessary and/or reasonable.[13] I credit the Claimant's description of hydrotherapy, massage and note that swimming is only a part of the program.[14] I accepted that "swimming" includes hydrotherapy and massage, which apparently comes with the membership at no additional cost. I determined that the Employer/Carrier failed to prove lack of necessity, reasonableness, and failed to establish that there was any other preexisting or degenerative process rather than the compensable impairment that is treated by "swimming". "The Employer/Carrier attempted to completely discredit swimming as a form of therapy applicable to this fact pattern, but produced no evidence in support of the argument. Moreover, the Employer Carrier did not place evidence into the record to disprove or diminish the Claimant's testimony regarding the nature, extent, efficiency and cost

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[12] On April 14, 1999, Dr. Michaels also prescribed physical therapy, for a period of three weeks, three times per week (2002 CX 4). The note states that the treatment program is for a back program and includes massage and traction, but that ultrasound is contraindicated (Id.). A similar prescription was issued on December 22, 1998. It notes that hot packs, electronic stimulation, traction and massage should be applied (2001 CX 7).

[13] Note that the Employer/Carrier did not file a controvert, and merely neglected Claimant's request. See 20 CFR §§ 702.421, effect of failure to obtain initial authorization. An employee shall not be entitled to recover for medical services and supplies unless:

> (a) The employer shall have refused or neglected a request to furnish such services and the employee has complied with sections 7 (b) and (c) of the Act, 33 U.S.C. 907 (b) and (c) and these regulations; or
>
> (b) The nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

[14] An employer is not liable for medical expenses due to the degenerative processes of aging. *See* ***Haynes v. Rederi A/S Aladdin***, 362 F.2d *345 (5th* Cir. 1966), *cert. denied,* 385 U.S. 1020 (1967). A physician's direct and immediate supervision is not required for treatment to be compensable. The fact that a physician prescribed the particular therapy with sufficient specificity for the services to be performed by the therapist to whom he referred the claimant, referred the claimant to a therapist, and followed the claimant's progress in the therapy is sufficient, even if the physician defers to the expertise of the therapist in the specifics of the particular treatment.

of the swimming program" (ALJ- 4).

Therefore, upon full review of the record, I reject the Claimant's allegation that he did not know that he was entitled to transportation expenses for visits to the swimming facility and the mall until after Judge Miller rendered his decision. It is clear that the Claimant actually requested them from Judge Miller. And the Claimant's credibility is also suspect as he requests payment for periods of time after 1994, when he admittedly was no longer attending the swimming facility. ***Perini Corp. v. Hyde***, 306 F. Supp. 1321, 1327 (D.R.I. 1969). Therefore, I have discretion to accept all of the Claimant's assertions, or accept those that I consider to be substantiated by other evidence.[15]

English Literacy

A second "special circumstance" cited by the Claimant is that a poor understanding of the English language deprived him of an opportunity to assert modification in a timely manner.

As I had set forth above, the Claimant actively participated not only in two hearings before me, but in several other hearings. The Claimant's credibility with respect to his command of English must be challenged. In the case before Judge Miller, the Claimant established that he is a United States citizen, had a highschool and technical education in his native Greece, and had lived in the United States since 1972, and was reasonably conversant in English. Though he could read and write in Greek, he stated that he had limited ability to read and write English. See ALJ- 3.

In my Notice of Hearing, I specifically advised that the Claimant has an obligation to provide his own interpreter, if one is needed (ALJ-1). During the course of the 2002 case, Mr. Nides participated by reading dates and amounts into the record (for example, Tr 26,30). In the 2001 case, Mr. Nides alleged that in 1998, when he settled the compensation aspect of his claim, his English was "only 15, 20 percent..." (2001 Tr 4). However, he inferred that it has improved over time. He alleged that he can write in Greek, but not in English (2001 Tr 46). Mr. Nides also alleged that he (and his driver) could not read English (2001 Tr 57). But he read the exhibits, proffered them and moved them into evidence (2110 Tr 22-23). He read the titles of the exhibits into the record (Id.). And he was able to compare copies of disputed medical exhibits for error, on the record (2001 Tr 16, 18). He advised me,

"...if you read Dr, Collins report, you will see it he never mentioned about this."

(2001 Tr 17). He was able to present certain receipts and explain each of them for the record (Tr 22-24, 47). I directed him to certain receipts and questioned them about them and I received responsive answers (2001 Tr 22-29, 48 -50).

Therefore, I do not accept that the Claimant is credible on this issue. Had he needed an interpreter, Mr. Nides could have brought one with him to the several hearings he had where he represented himself. Judge Miller's Decision and Order was admitted into both the 2001 and the 2002 records. It is also a public record, as it is published by this office. Mr. Nides' statements to Judge Miller and to me regarding his command of English and literacy are examples of

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[15] The Board will not interfere with credibility determinations made by an ALJ unless they are "inherently incredible and patently unreasonable." ***Cordero v. Triple A Machine Shop***, 580 F.2d 1331, 1335, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 **U.S.** 911 (1979); ***Phillips v. California Stevedore & Ballast Co.***, 9 BRBS 13 (1978).

inconsistent positions. Not only did he participate in English, he actually read into the record in English. It is solely within my discretion to accept or reject all or any part of any testimony. ***Perini Corp. v. Hyde***, *supra*. I note that the Claimant has an accent, but I do not accept that he failed to understand the nature of the proceedings before me and do not accept that command of English is a significant factor.

Legal Malpractice

I am also advised that the Claimant was not entitled to present an accurate representation of his medical condition to Judge Miller because his attorney failed to introduce four doctors reports at the hearing and failed to make Mr. Nides aware that such documents existed. Besides accusing his attorney who handled the post hearing development of the 1998 case of misfeasance, Mr. Nides accused the lawyer who handled the 1988 Section 8(i) settlement of malpractice. He claims that she failed to explain the ramifications of settlement and that as a result, his Social Security benefits were reduced (Tr 45-46). If the Claimant is requesting that I also review the 1988 settlement, I am not empowered to do so. The 1984 Amendments are applicable to motions for modification pending at the time of enactment. ***McDonald v. Director, OWCP***, 897 F.2d 1510 (9th Cir. 1990), rev'g ***McDonald v. Todd Shipyards Corp***., 21 BRBS 184 (1988); ***Lambert v. Atlantic & Gulf Stevedores***, 17 BRBS 68 (1985). Prior to the 1984 Amendments, case law had interpreted Section 22 as excluding settlements as well, so that under no circumstance is a settlement which complies with the criteria of the LHWCA subject to modification. ***Lambert***, 17 BRBS 68.

The ground of newly discovered evidence is generally viewed with disfavor. ***Dabney v. Montgomery Ward & Co.***, 692 F.2d 49, 52 (8th Cir.1982), *cert. denied*, 461 U.S. 957, 103 S.Ct. 2429, 77 L.Ed.2d 1316 (1983). For example, by anology to the rule permitting Relief From Judgment or Order, a movant may prevail on a Rule 60(b)(2) motion by showing:

(1) the evidence was discovered after trial;

(2) due diligence was exercised to discover the evidence;

(3) the evidence is material and not merely cumulative or impeaching; and

(4) the evidence is such that a new trial would probably produce a different result.

Baxter Int'l Inc. v. Morris, 11 F.3d 90 (8th Cir.1993).

The Claimant maintains that he acted with due diligence, but admits that he failed to file for modification after the Benefits Review Board decision. Therefore, I can not fully credit the Claimant on this issue.

The general rule is that "clients must be held accountable for the acts and omissions of their attorneys." ***Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship***, 507 U.S. 380, 396, 113 S.Ct. 1489, 1499, 123 L.Ed.2d 74 (1993). Public policy requires that a client, having chosen a particular attorney to represent him in a proceeding, cannot "avoid the consequences of the acts or omissions of this freely selected agent," and that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney."[16] Section 22 is not intended to provide a back-door route to retry a case, or to protect litigants

[16] ***Id,*** 507 U.S. at 397, 113 S.Ct. at 1499.

from their counsels' litigation mistakes. ***Kinlaw v. Stevens Shipping and Terminal Co.***, 33 BRBS
68 (1999) (Board upheld the ALJ's denial of a Section 22 modification request where the employer's only explanation for not developing testimony previously was its erroneous belief that it was unnecessary.)

However, there are exceptions. In ***Liljeberg v. Health Services Acquisition Corp***., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), the Supreme Court found that violation of a statute which requires a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned may warrant relief from final judgment provided motion is made within a reasonable time.[17]

But case law shows that "out-and-out lawyer blunders--the type of action or inaction that leads to successful malpractice suits by the injured client--do not qualify as 'mistake' or 'excusable neglect' within the meaning of [Rule 60(b)(1)]." ***Helm v. Resolution Trust Corp***., 161 F.R.D. 347, 348 (N.D.Ill.1995), *aff'd*, 84 F.3d 874 (7th Cir.1996); see also ***United States v. Prairie Pharmacy, Inc***., 921 F.2d 211, 214 (9th Cir.1990) (holding that an attorney's "failure to verify the requirements of the law demonstrates attorney malpractice, not excusable neglect under the law of this circuit"); ***Pryor v. U.S. Postal Serv.***, 769 F.2d 281, 288-89 (5th Cir.1985) ("Were this Court to make an exception to finality of judgment each time a hardship was visited upon the unfortunate client of a negligent or inadvertent attorney, even though the result be disproportionate to the deficiency, courts would be unable to ever adequately redraw that line again, and meaningful finality of judgment would largely disappear.").

In ***McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc***., --- F.3d ----, 2002 WL 1769366 (6th Cir., 2002) the plaintiffs alleged that they had misfiled the case based on a mistake of fact, attributable to their lack of legal knowledge or background, and their reliance on the "erroneous advice of their former attorney." Relying on ***FHC Equities, L.L.C. v. MBL Life Assurance Corp***., 188 F.3d 678, 683-87 (6th Cir.1999), the Court held that that neither strategic miscalculation nor counsel's misinterpretation of the law warrants relief under Rule 60(b).

In ***Nemaizer v. Baker***, 793 F.2d 58 (2d Cir.1986), the Second Circuit reviewed a District Court's decision to consider whether to grant relief under Rule 60(b) in order to avoid the

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[17] The Supreme Court relied in part on 28 USC § 455, which sets forth standards for recusal of judges to apply Rule 60(b). After judgment in favor of a defendant in an action for declaratory judgment to determine ownership of a corporation, plaintiff filed a motion to vacate judgment and for new trial based on a contention that the trial judge should have recused himself because he was trustee of a university which had interest in litigation. After denial of motion, an appeal was taken. The Court of Appeals, 747 F.2d 1463 (unpublished opinion), reversed and remanded. On remand, the United States District Court for the Eastern District of Louisiana, denied the motion and plaintiff again appealed. The Court of Appeals, 796 F.2d 796, reversed and remanded, vacating the original judgment and a subsequent petition was filed for writ of certiorari. The Supreme Court, Justice Stevens, held that: (1) district judge violated statute requiring judge to disqualify himself by failing to disqualify himself in litigation involving the university, and (2) the trial judge's failure to disqualify himself in proceeding in violation of statute required vacatur.

apparently unintended *res judicata* effect of a voluntary dismissal with prejudice. The Second Circuit set aside this award, stating that "an attorney's failure to evaluate carefully the legal consequences of a chosen course of action provides no basis for relief from a judgment." ***Id***. at 62.

In this case, the Claimant alleges that he fired his lawyer, who did not represent him at hearing, because he refused to file an appeal. I admitted the exhibits and I have reviewed them.[18] Although it is possible that Mr. McCullough knew or had reason to know that introduction of the reports might have changed the outcome, the Claimant bears the burden to prove to a reasonable degree of probability and certainty that it would have changed the outcome. "Burden of proof" as used in the this setting and under the Administrative Procedure Act[19] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.[20] "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C.A. § 556(d)4. The drafters of the APA used the term "burden of proof' to mean the burden of persuasion. ***Director, OWCP, Department of Labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 114 S.Ct. 2251 (1994).[21] A claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production, the obligation to come forward with evidence to support a claim.[22] A claimant, bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 BLR 1-860 (1985).

Again, at hearing, in 2001, the Claimant argued that I should revisit the opinion rendered by Dr. Hinkes (2001 Tr 9-12). At that time, he was not entitled to modification because of the

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[18] The judge must re-open the record to allow in new evidence in a modification proceeding.
Moore v. Washington Metro. Area Transit Auth., 23 BRBS 49 (1989); ***Delay v. Jones Washington Stevedoring Co.***, 31 BRBS 197 (1998).

[19] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with "the APA"); 5 U.S.C. § 554(c)(2). Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. §§ 932(a).

[20] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director, OWCP [Sainz]***, 748 F.2d 1426, 7 BLR 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a claimant to an employer/carrier.

[21] Also known as the risk of nonpersuasion, see 9 J. Wigmore, ***Evidence*** § 2486 (J. Chadbourn rev. 1981).

[22] *Id*., also see ***White v. Director, OWCP***, 6 BLR 1-368 (1983).

lapse of time before he requested this type of review. Based on a review of the entire record, the reports submitted by the Claimant are neither new or material evidence, as the Claimant argues, because he knew of their existence at the time that he was representing himself in 1998 to 1999, and he reiterated the same argument before Judge Miller. At that time, Mr. Nides acted as his own lawyer and it was he who failed to introduce these documents. Moreover, although the reports show that the Claimant was impaired, but they, standing alone, are not dispositive on the issue before Judge Miller, regarding the need for swimming and mall walking, without further development. These reports may or may not completely impeach or discount Dr. Hinkes' testimony, as the Claimant now alleges. In order for them to do so, I would have to essentially retry the case and give both parties the right to depose the treating physicians. Therefore, the Claimant can not prove that the outcome would definitely be changed if I permit reopening.

I have already addressed the issue regarding whether the Claimant knew that he had a right to seek transportation expenses for visits to the swimming pool and to the mall, and have determined that the Claimant is less than credible as to this issue. He requested reimbursement as set forth as Issue 6 in Judge Miller's Decision and Order and the Claimant has not affirmatively shown that the documents he claims were overlooked on Mr. McCullough's watch, as Mr. Nides had orchestrated the proffer of documents into the record at hearing and had the complete record at his disposal. Moreover, he has not proved that had the documents been proffered that the outcome before Judge Miller, to any reasonable degree of probability would have been changed. Therefore, for several reasons, the Claimant has failed to meet his burden, and no exception to the general rule applies in this case.

Review of the 2001 and 2002 Record

I have thoroughly reviewed the 2001 record as well as the 2002 record before me. I find no basis to reopen the 1999 Benefits Review Board Decision and Order and the 1998 Decision and Order. I also do not accept that there has been any showing of "special circumstances" that may warrant relief. In fact, the allegations argued by Claimant, even if proved do not warrant relief from the one year filing requirement for modification.[23]

Attorney's Fee

As the Claimant is not entitled to any benefits, a "successful prosecution" has not been made, and attorneys fees are not owing. 33 USC §928(a).

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[23] Such "exceptional circumstances" may include substantially different evidence raised on subsequent trial, a subsequent contrary view of the law by the controlling authority, or a clearly erroneous decision which would work a manifest injustice. ***White v. Murtha***, 377 F.2d 428 (5th Cir.1967). See also ***Southern Ry. Co. v. Clift***, 260 U.S. 316 (1922); ***Zichy v. City of Philadelphia***, 590 F.2d 503 (3d Cir. 1979); ***Petition of United States Steel Corp***., 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973); ***American Surety Co. of New York v. Bankers' Sav. & Loan Ass'n of Omaha, Neb***., 67 F.2d 803 (8th Cir. 1933), *cert. denied*, 291 U.S. 678 (1934); ***Johnson v. Cadillac Motor Car Co.***, 261 F. 878 (2d Cir. 1919); ***Atkinson v. Prudential Ins. Co***., 43 F.3d 367 (8th Cir.1994).

Document Preparation

In a letter to me, dated June 17, 2002, the Claimant's daughter submitted a bill for document preparation, totaling $750.00. The Claimant did not move for the admission of that document, and given the remainder of the decision in this case, the request is moot.

ORDER

After a full review of the record, the Motion for Modification for payment of certain claimed transportation expenses for the period 1984 to 2000 under Section 22 of the Act is **DENIED**.

SO ORDERED.

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Daniel F. Solomon
Administrative Law Judge